

Reproduced with permission of Camilla B. Andersen & Ulrich G Schroeter eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmons & Hill Publishing (2008) 347-360

## **Is a Post-Breach Decline in the Value of Currency an Article 74 CISG “Loss”?**

*John P McMahon* [\*]

### DEDICATION

It is an honor to be among those invited to contribute to this Festschrift. There are many others who would wish to participate, for it is fitting that Professor Albert Kritzer be honored for his contributions to the promotion of a uniform understanding and harmonized application of the CISG and to bridging the divide between those who have access to major legacy libraries and those who do not. Certainly, the CISG projects with which he has been involved reflect the efforts and dedication of others, too, but his energy and his vision have been the forces behind the development of the Pace University School of Law’s Institute for International Commercial Law CISG database, a network of similarly-motivated electronic repositories of CISG materials, and the founding of the CISG Advisory Council. In addition, Al is very much liked by all who know him. There is no doubt that the number of entries in the Pace bibliography would be much increased had all who wished to do so had the opportunity to join us in this book of honor and friendship.

### INTRODUCTION

In 2006, in the new features segment of the Pace CISG database, Al wrote that ‘Damages is the most important remedy under the CISG – indeed, under any sales law....’ For that reason, he has said, CISG Advisory Council

\* Attorney; J.D. (New York University School of Law); LL.M (Georgetown University Law Center); Member Editorial Board and former Editor, *Journal of Maritime Law & Commerce*; Chair (1995-2006) and Co-Chair (1989-1990), Committee on International Sales and Related Commercial Transactions, International Law and Practice Section, New York State Bar Association.

Opinion No. 6, *Calculation of Damages under CISG Article 74*,<sup>1</sup> is the most important of the six opinions the Council has rendered. CISG-AC Opinion No. 6 explores burden of proof and the types of damages the Council's experts regard as recoverable Article 74 CISG losses, *vel non*. To those familiar with U.S. domestic law governing sales contract damages, in large part the Council's views will be unsurprising. The Council's rule on adjusting damage awards for a decline in the value of the contract currency is among the exceptions. This is the core of what the Council said:

3.5 An aggrieved party also may recover losses resulting from declining exchange rates if the aggrieved party can prove that it would have received a higher monetary value if the breaching party had paid the money owed pursuant to the contract. The aggrieved party's loss in this situation can be measured by the difference between the converted value of the currency at the time payment was due under the contract and the value of the converted currency at the time of payment.

3.6 The following example illustrates this point. Assume that a contract calls for a buyer to pay U.S. \$10,000 upon delivery of goods to a seller in country X where the currency is the Euro and the rate of exchange (at the time of delivery) for U.S. \$10,000 is Euro \$10,000. The buyer then wrongfully refuses to pay the seller and the seller files a suit in an American court to collect. However, by the time that the court enters judgment in favor of the seller, US \$1 is worth only Euro \$0.7692. Thus, awarding the seller U.S. \$10,000 would, in effect, give the seller only Euro \$7692. The seller is thus entitled to its payment under the contract (U.S. \$10,000), plus an additional U.S. \$3,000, which would give the seller the equivalent of Euro \$10,000.<sup>2</sup>

This is not the familiar breach day versus judgment date versus payment day quandary regarding valuing foreign currency claims for purposes of entering a judgment in the currency of the forum. In the Council's view,

<sup>1</sup> CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74* (Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA), available at: <http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html>.

<sup>2</sup> The Council explained its rationale in paras 3.7-3.9.

Article 74 CISG requires an uplift to offset a post-breach diminution in the value of the contract currency. With the value of the U.S. dollar, the currency of account and payment in many international sales transactions, declining, the rule announced by the Council is important. No doubt, the Council's pronouncement will be the centerpiece of contentions that a post-breach decline in the value of currency is an Article 74 CISG 'loss.'

Is the Council's view likely to withstand analysis under the approach to treaty interpretation revealed in recent decisions of the United States Supreme Court?

## DISCUSSION

In our Constitution, the States comprising the Union have delegated certain powers to the Federal Government, while powers not delegated to the Federal Government are reserved to the States. The States have delegated the power to make treaties. When it applies, a treaty is the supreme law of the land and supersedes the laws of the several States. When a treaty does not apply, the Federal Government has not enacted a statute governing the matter under some other delegated power, and the matter is not controlled by the Constitution itself, State law governs. The only powers possessed by the three separate branches of the Federal Government are those granted by the Constitution. Under the Constitution, the power to make treaties rests with the President, that is, effectively, the Executive Branch, acting with the advice and consent of the Senate. The courts, including the Supreme Court, have the power to interpret treaties in cases arising under them for the purpose of applying them as domestic law, but have no treaty-making power. These concerns and circumstances are manifest in the decisions of the Supreme Court bearing on the question before us.

### **Selected Precedents**

The Supreme Court's decisions in Warsaw Convention cases during the last two decades should be harbingers of the approach the Supreme Court is likely to take when it is called upon to interpret the CISG.

In 1985, a unanimous Court decided *Air France v. Saks*.<sup>3</sup> The case called for the Court to declare the meaning of the term 'accident' in Article 17 of the Warsaw Convention. This is one of AI's favorite treaty interpretation cases, because the Court adopted as its own the words of a lower court in another Warsaw Convention case and said 'we "find the opinions of our sister signatories to be entitled to considerable weight."' In addition to consideration of the decisions of French and English courts, the Court's interpretative process included contrasting the term 'accident' of Article 17 with 'occurrence' in Article 18 Warsaw Convention; consideration of the common dictionary meanings of 'accident' and its French equivalent and its meaning in U.S. legal usage; consideration of domestic and foreign scholarly works; and consideration of the negotiating history of the Convention and the subsequent interpretations of the signatories at later diplomatic conferences.

In 1991, the late Justice Marshall wrote the opinion of a unanimous Court in *Eastern Airlines, Inc. v. Floyd*.<sup>4</sup> Again, the case involved the interpretation of Article 17 Warsaw Convention. The issue was whether a passenger could recover for emotional distress, 'mental injuries', without having suffered physical injuries. The Court ruled against the passenger. At the outset, Justice Marshall recited the methods the Court would use in interpreting the treaty. He mentioned consideration of the text and context, the application of general rules of construction to difficult or ambiguous terms, a liberal construction extending beyond the written words to the history of the treaty negotiations, and consideration of the practical construction adopted by the parties. The absence, preceding the Convention, of French cases, commentaries, or legislation applying the treaty term to them led to the conclusion that reading Article 17 Warsaw Convention to include mental injuries would be inconsistent with the shared expectations of the parties. In this regard, Justice Marshall noted that many countries involved in the negotiation of the Convention would not have recognized a cause of action for mental injury alone. Turning to the negotiating history, he found, among other things, that there was no evidence that the drafters or signatories of the Convention specifically considered liability for mental injury or the meaning of the term

<sup>3</sup> U.S. Supreme Court, 4 March 1985 (*Air France v. Saks*), 470 U.S. 392 (1985), available at: <http://supreme.justia.com/us/470/392/case.html>.

<sup>4</sup> U.S. Supreme Court, 17 April 1991 (*Eastern Airlines, Inc. v. Floyd*), 499 US 530 (1991), available at: <http://supreme.justia.com/us/499/530/case.html>.

in issue. Again, he mentioned the status of the law on the issue at the time of the negotiations leading up to the adoption of the treaty text. 'Indeed the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention.'<sup>5</sup> He said the Court found its reading of the Convention to be consistent with 'the primary purpose of the contracting parties.'

In 1996, Justice Scalia wrote the Court's decision in *Zicherman v. Korean Air Lines Co.*,<sup>6</sup> another case that involves issues of interpretation that are close to those that arise in interpreting Article 74 CISG. The plaintiff sought damages for the loss of the love, affection, and companionship of a passenger/victim. The Court was called upon to determine the meaning of the word 'damage' as used in the English translation of Article 17 Warsaw Convention and its equivalent, '*dommage*,' in the official French text. It took the word to mean 'legally cognizable harm' on the basis that applying a broader dictionary meaning would lead to illogical results. The Court concluded that the treaty left it to adjudicating courts to specify what harm is cognizable. It did so after examining the language of Article 17 in the light of Article 24 Warsaw Convention, which, in effect, said that the Convention explicitly left open the issues of who could sue and for what; the relevant parts of the negotiating history; the decisions of foreign courts on the same issue; and the views of commentators.

The Court's latest decision construing the Warsaw Convention contains an interesting exchange between Justice Scalia and the Court's majority concerning the place of the decisions of the courts of other signatories in the interpretative process. In *Olympic Airways v. Husain*,<sup>7</sup> the majority's ruling was inconsistent with the result in two decisions rendered by intermediate appellate courts in England and Australia. In his dissent,<sup>8</sup> Justice Scalia noted that under *Saks*, *Floyd*, and *El Al Israel Airlines, Ltd. v. Tseng*,<sup>9</sup> the judgments

<sup>5</sup> *Id.* at 544-545.

<sup>6</sup> U.S. Supreme Court, 16 January 1996 (*Zicherman v. Korean Air Lines Co.*), 516 U.S. 217 (1996), available at: <http://supreme.justia.com/us/516/217/case.html>.

<sup>7</sup> U.S. Supreme Court, 24 January 2004 (*Olympic Airways v. Husain*), 540 U.S. 644 (2004), available at: <http://supreme.justia.com/us/540/644/case.html>.

<sup>8</sup> *Id.* at 658.

<sup>9</sup> U.S. Supreme Court, 12 January 1999 (*El Al Israel Airlines, Ltd. v. Tseng*), 525 U.S. 155 (1999), available at: <http://supreme.justia.com/us/525/155/case.html>.

of sister signatories were to be accorded considerable weight and asserted that the majority's decision stood out 'for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.' He went on to say that 'Because the Court offers no convincing explanation why those cases should not be followed, I respectfully dissent.' Developing his theme, he said:

We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. (The Warsaw Convention's preamble specifically acknowledges 'the advantage of regulating *in a uniform manner* the conditions of . . . the liability of the carrier.') Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration.<sup>10</sup>

Further, he said he 'would follow the holdings of [the foreign decisions], since the Court's analysis today is no more convincing than theirs.'

Responding to his contentions, the majority wrote that, where the reasoning in foreign decisions is inconsistent with what the Court perceives to be the correct reasoning, 'we are hesitant to "follow" the opinions of intermediate appellate courts of our sister signatories,' especially when the foreign courts of last resort have yet to speak.<sup>11</sup> To this Justice Scalia responded: 'To the extent the Court implies that [the foreign decisions] merit only slight consideration because they were not decided by courts of last resort, I note that our prior Warsaw Convention cases have looked to decisions of intermediate appellate foreign courts as well as supreme courts.'<sup>12</sup>

### Analysis

The foregoing suggests that, in the United States, the following circumstances will guide the process by which courts will determine whether Article 74

<sup>10</sup> Id at 660-661.

<sup>11</sup> Id at 655-656.

<sup>12</sup> Id at 662.

CISG requires or permits compensation for post-breach currency related losses.

The CISG does not expressly address the issue. There is no evidence that the drafters or the signatories of the CISG specifically considered the issue of compensation for post-breach currency fluctuation losses. Neither the 1964 Uniform Law on the International Sale of Goods (ULIS),<sup>13</sup> which served as a blueprint for UNCITRAL's preparatory work on the relevant part of the CISG, nor André Tunc's commentary on the ULIS<sup>14</sup> mention the subject. There is no reference to the subject of post-breach currency related losses in the reports regarding the Working Group studies and discussions that led to the 1978 draft of the CISG, in the UNCITRAL Commentary on the 1978 draft<sup>15</sup> or in the records of the Vienna Conference.

During the period it was developing the CISG, UNCITRAL had concerned itself with one aspect of the currency fluctuation problem. In 1978, it adopted a program of work that included a study of international contract practices regarding clauses protecting parties to international transactions against the effects of currency fluctuations. Thus, at the time that the UNCITRAL Secretariat was working on the 1978 draft of the CISG and preparing its well-known 14 March 1979 commentary, it was studying the problem of currency fluctuations. The Commission Secretariat prepared a report, dated 20 March 1979,<sup>16</sup> on that subject. In it, the Secretariat noted that the currency value problem arose out of the combined operation of a 'legal principle' and an empirical fact. The legal principle was nominalism, i.e., what the report described as 'the doctrine that the quantum of a monetary obligation is in the eyes of the law to be measured in numerical (i.e. number-of-monetary-unit

<sup>13</sup> Available at: <http://www.jus.uio.no/lm/unidroit.ulis.convention.1964>.

<sup>14</sup> Tunc, A (1966) 'Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale' in *Records and documents of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague 2-25 April 1964* Ministry of Justice of the Netherlands, available at: <http://cisgw3.law.pace.edu/cisg/biblio/tunc.html>.

<sup>15</sup> UNCITRAL Secretariat, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, UN Doc A/CONF.97/5 (14 March 1979), available at: <http://www.cisg-online.ch/cisg/materials-commentary.html>.

<sup>16</sup> *Report of the Secretary-General: Clauses Protecting Parties against the Effects of Currency Fluctuations*, UN Doc A/CN.9/164 (20 March 1979), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/NL7902/23/PDF/NL790223.pdf>.

terms) rather than in terms of real or effective value.' Had the Secretariat thought in March 1979 that the CISG was to contravene that legal principle, would it not have said so in its commentary on the 1978 draft?

Article 74 CISG, being written at the level of principle, leaves it to the courts to specify what losses are recoverable. Almost two decades after the CISG came into effect, judicial precedents construing Article 74 CISG as it applies to post-breach currency exchange losses are sparse. They do not present a consistent pattern of reasoned decisions supporting the conclusion that, as used in Article 74 CISG, the term 'loss' comprehends post-breach declines in the value of currency. The lack of harmonious interpretation is evident in the UNCITRAL Digest's description of the cases:

**- Losses arising from change in value of money**

19. Article 74 provides for recovery of 'a sum equal to the loss' but does not expressly state whether this formula covers losses that result from changes in the value of money. Several courts have recognized that an aggrieved party may suffer losses as a result of non-payment or delay in the payment of money. These losses may arise from fluctuations in currency exchange rates or devaluation of the currency of payment. The courts differ as to the appropriate solution. Several decisions have awarded damages to reflect devaluation or the changes in the cost of living. On the other hand, several other decisions refused to award damages for such losses. One decision concluded that in principle a claimant is not entitled to recover losses from currency devaluation but went on to suggest that a claimant might recover damages if it carried out transactions in foreign currency which it exchanged immediately after receiving the currency. Another court stated that while devaluation of the currency in which the price was to be paid could be damages under the Convention no damages could be awarded in the case before it because future losses could be awarded only when the loss can be estimated'.<sup>17</sup>

CISG-AC Opinion No. 6 and the UNCITRAL Digest cite relatively few decisions directly on point. Looking first at U.S. cases, in 2002, in *Schmitz-*

<sup>17</sup> Chapter 5, Section 2, para 19, UNCITRAL Digest of Case Law on the CISG, UN Doc A/CN.9/SER.C/DIGEST/CISG/74 (8 June 2004), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/V04/555/63/PDF/V0455563.pdf?>

*Werke GmbH v. Rockland Industries*,<sup>18</sup> a federal court of appeals ruled as follows: the CISG is silent on the issue of currency conversion; therefore, it is proper for courts to resort to private international law; and, under the choice of law rules applicable in the circumstances, the law of the forum State applied. The district court had applied the breach date rule. In the absence of State law on point, the appellate court considered whether the judgment date rule or the breach date rule 'fairly compensates an injured party.' In *Delchi Carrier S.p.A. v. Rotorex Corp.*,<sup>19</sup> a federal district court in New York construed Article 74 CISG as it concerned claims for various expenses and costs, but applied New York State's breach date rule to determine the rate at which an Italian lira claim for CISG damages should be converted into U.S. Dollars. As the lira had declined in value between the breach date and the date of judgment, reference to the breach date value of the lira achieved the same result as compensating the plaintiff for currency devaluation damages. Apparently, neither the court nor counsel thought that the CISG furnished the rule of decision.

Turning to the decisions of foreign courts, there is a decision of a Netherlands court of first instance,<sup>20</sup> which is not available in translation. A Unilex abstract says the court ruled that the buyer had to pay damages for devaluation because the seller would not have incurred a currency related loss if the buyer had paid in due time.<sup>21</sup> In 1994, a German state appellate court denied compensation for currency devaluation damages where the Italian seller failed to show that, in the circumstances, it suffered a loss as a result of the decline in the value of the Italian Lira against the Deutsche Mark. The court did not mention Article 74 CISG. Its comments indicated that it was applying a rule of general applicability, not a rule of sales contract damages under the CISG: 'A currency devaluation can only be compensated if it leads to damages on the part of the creditor, for instance, if the creditor usually conducts

<sup>18</sup> U.S. Court of Appeals [4th Circuit], 21 June 2002 (*Schmitz-Werke GmbH v. Rockland Industries*), available at: <http://cisgw3.law.pace.edu/cases/020621u1.html>.

<sup>19</sup> U.S. District Court [N.D. New York], 9 September 1994 (*Delchi Carrier S.p.A. v. Rotorex Corp.*), available at: <http://cisgw3.law.pace.edu/cases/940909u1.html>.

<sup>20</sup> Arrondissementsrechtbank Roermond (Netherlands), 6 May 1993 (*Gruppo IMAR v. Protech Horst*), available at: <http://cisgw3.law.pace.edu/cases/930506n1.html>.

<sup>21</sup> Abstract available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=94&step=Abstract>.

his money transfers in a third currency....<sup>22</sup> There are two decisions of Swiss courts of first instance, the commercial courts of Zurich and St. Gallen. In the Zurich case,<sup>23</sup> decided in 1997, the court stated that an exchange loss is to be compensated as consequential damage under Articles 45(1)(b) and 74 CISG, but concluded that the loss was not recoverable under a domestic rule under which damages had to be ascertainable at the time of judgment, i.e., as the defendant had not yet paid, the exchange loss could not be calculated. In the second case,<sup>24</sup> decided in 2002, the court did not mention Article 74 CISG in its discussion of the currency exchange issue. It cited a Swiss statute, which it described as dealing with the default of any debtor, under which damages include compensation for exchange rate losses, and a commentary on that law.

Article 74 CISG is derived from Article 82 of the ULIS. CISG-AC Opinion No. 6 cites an Article 82 ULIS case, the relevant part of which is reported in translation on the Pace CISG database.<sup>25</sup> In it, the court concluded that the seller could not claim delayed payment damages based on a post-breach decline in the value of the currency used in the invoice as the currency of payment. Relying in part on the reliefful effect of Article 83 ULIS, which is akin to Article 78 CISG, the court stated the 'there is no room for losses resulting from an unfavorable conversion rate when determining the compensable damage under Art. 82 ULIS.'

With the exception of CISG-AC Opinion No. 6, there is little on the subject of compensation for post-breach currency related losses in the 'the

<sup>22</sup> Oberlandesgericht Düsseldorf (Germany), 14 January 1994, 17 U 146/93, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940114g1.html>.

<sup>23</sup> Handelsgericht Zürich (Switzerland), 5 February 1997, *Transportrecht, Beilage Internationales Handelsrecht* (1999)12, available at: <http://cisgw3.law.pace.edu/cases/970205s1.html>.

<sup>24</sup> Handelsgericht St. Gallen (Switzerland), 3 December 2002, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (2003) 104, available at: <http://cisgw3.law.pace.edu/cases/021203s1.html>.

<sup>25</sup> Landgericht Heidelberg (Germany), 27 January 1981, *Recht der Internationalen Wirtschaft* (1982) 285, available at: <http://cisgw3.law.pace.edu/cases/810127g1.html>. This decision is discussed in Buschtöns, C (2005) *Damages under the CISG: Selected Problems* University of Cape Town at 59-61, available at: [http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/243/1/BuschtoensC\\_2005.pdf](http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/243/1/BuschtoensC_2005.pdf).

teachings of the most highly qualified publicists.<sup>26</sup> AI's 1989 *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* does not mention the subject. Neither did the first two editions of Professor John O. Honnold's leading text, *Uniform Law for International Sales under the 1980 United Nations Convention*. The third edition, published in 1999,<sup>27</sup> does. At section 408, Professor Honnold mentions two of the cases cited in CISG-AC Opinion No. 6, but takes no position on the subject. He cites a 1995 law review article suggesting that rate of conversion may be beyond the scope of the CISG because none of the commentaries, including his, mentions the issue.<sup>28</sup>

UNCITRAL has adopted the judgment day rule in its 'Draft convention on the carriage of goods [wholly or partly] [by sea].'<sup>29</sup> Article 62 of the draft would limit a carrier's liability for cargo damage and delay to a number of 'units of account.' Paragraph 4 of Article 62 says:

The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties.<sup>30</sup>

The draft convention's approach is inconsistent with the idea that it is generally accepted that damage awards ought to be adjusted to offset the effects of a post-breach decline in the value of the contract currency or of other forms of currency related losses. Under the proposed regime, if the

<sup>26</sup> Article 38(1)(d) of the Statute of the International Court of Justice, available at: [http://library.lawschool.cornell.edu/cijwww/icjwww/ibasicdocuments/ibasicstatute.htm#CHAPTER\\_III](http://library.lawschool.cornell.edu/cijwww/icjwww/ibasicdocuments/ibasicstatute.htm#CHAPTER_III).

<sup>27</sup> Available at: <http://cisgw3.law.pace.edu/cisg/biblio/honnold.html>.

<sup>28</sup> Darkey, JM (1995) 'A US Court's Interpretation of Damage Provision Under the CISG' (15) *Journal of Law and Commerce* 139-152, available at: <http://cisgw3.law.pace.edu/cisg/biblio/darkey2.html>. See also Felemegas, J (2000-01) 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' *Review of the Convention on Contracts for the International Sale of Goods* 115, available at: <http://cisgw3.law.pace.edu/cisg/biblio/felemegas-07.html>.

<sup>29</sup> UN Doc A/CN.9/WG.III/WP.81 (13 February 2007), available at: <http://daccess-dds.un.org/doc/UNDOC/LTD/V07/807/35/PDF/V0780735.pdf>.

<sup>30</sup> *Id* at 46.

SDR declines in value relative to the national currency between the date of the damage or loss and the date of the judgment or award, the cargo interests would receive less in national currency. It would seem, too, that, because the SDR is a notional numeraire that must always be converted, UNCITRAL's approach is inconsistent with the 'immediate conversion to local currency' rationale for the result reached in CISG-AC Opinion No. 6 paragraph 3.6.<sup>31</sup>

Because the Judicial Branch of the Federal Government tends to defer to the Executive Branch's interpretation of treaties, it is appropriate to take account of the brief<sup>32</sup> submitted by the Solicitor General<sup>33</sup> and the Department of State at the invitation of the Supreme Court in *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.* In it, the Executive Branch responded to and opposed the contentions in an *amicus curiae* brief filed by Al and his colleagues on behalf of the International Association of Contract and Commercial Managers and the Institute of International Commercial Law of the Pace University School of Law.<sup>34</sup> Invoking *Saks, Floyd* and *Tseng*, the Executive Branch said:

Article 7(1)'s reference to 'the need to promote uniformity in [the Convention's] application' is not appreciably different from the rule that judicial decisions from other countries interpreting a treaty term are 'entitled to considerable weight.' And that interpretive principle is subordinate to the most basic ones: that 'analysis must begin \* \* \* with the text of the treaty and the context in which the written words are used.' [...] If, however, the text's meaning remains ambiguous, courts 'may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'

In a footnote, it noted that 'there is little question that attorneys' fees are an ancillary matter that is distinct from the underlying substantive law of contracts.' In U.S. law, as in the case of the 'American Rule' on attorneys' fees, the law governing currency conversion is ancillary to and distinct from the rules that govern damages for breach of contracts for the sale of goods.

<sup>31</sup> See Oberlandesgericht Düsseldorf, 14 January 1994, *supra* fn 22.

<sup>32</sup> Available at: <http://cisgw3.law.pace.edu/cisg/biblio/zapata4.html>.

<sup>33</sup> The Solicitor General is an officer of the Department of Justice who determines in which cases the Federal Government will seek review by the Supreme Court and the positions the Government will take before the Court.

<sup>34</sup> Available at: <http://cisgw3.law.pace.edu/cisg/biblio/zamicus.html>.

The breach day, judgment day, and payment day rules variously adopted by the State and federal courts apply to cases involving claims for breach of other types of contracts, cases involving contract debts and cases involving damages for tort. The 1989 Uniform Foreign-Money Claims Act applies to claims in contract, quasi-contract, and tort.<sup>35</sup>

Had the United States not ratified the CISG, contracts to which the CISG applies would be governed by the laws of the States, including State choice of law rules. At this writing, twenty-three states have addressed the issue of currency conversion by enacting the Uniform Foreign-Money Claims Act after the CISG came into effect. Consequently, what Chief Justice Roberts said in *Sanchez-Llamas v. Oregon*,<sup>36</sup> a June 2006 decision concerning the interpretation of Article 36 of the Vienna Convention on Consular Relations, is apt here: 'where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.'<sup>37</sup>

Finally, the Council's view of the situation posed in CISG-AC Opinion No. 6 paragraph 3.6 runs counter to received wisdom. *Die Deutsche Bank Filiale Nurnberg v. Humphrey*<sup>38</sup> involved a German law claim for German marks. The breach occurred in 1915. By the time the plaintiff sued in 1921, the mark had collapsed. Writing for the majority, Justice Holmes, one of our great jurisconsults, referred to a situation like that posed in paragraph 3.6 of CISG-AC Opinion No. 6 for analogy:

An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Obviously in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same. *If the debt had been due here and*

<sup>35</sup> Comment 6 to Section 1(6), available at: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ufmca89.htm>.

<sup>36</sup> U.S. Supreme Court, 28 June 2006 (*Sanchez-Llamas v. Oregon*), 126 S. Ct. 2669, available at: <http://supreme.justia.com/us/new-cases/04-10566.pdf>.

<sup>37</sup> *Id.* at 2680.

<sup>38</sup> U.S. Supreme Court, 23 November 1926 (*Die Deutsche Bank Filiale Nurnberg v. Humphrey*), 272 U.S. 517 (1926), available at: <http://supreme.justia.com/us/272/517/case.html>. See also McCormick, CT (1935) *Handbook on the Law of Damages* West Publishing at 198.

*the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account.*<sup>39</sup>

## CONCLUSION

Applying the rules of U.S. law on, and following the process of, treaty interpretation to be derived from the Supreme Court's recent Warsaw Convention cases and taking into account the constitutional prerogatives of the States of the United States leads the writer to think it is not at all likely that, in the United States, Article 74 CISG will be construed to require or permit an uplift to offset the effects of a post-breach decline in the value of the U.S. dollar or of other forms of currency related losses. This is not to say that exchange rate fluctuations affecting the value of foreign money claims for Article 74 CISG losses will not be reflected in the amount recovered. They will be taken into account under State laws of general applicability, not by virtue of the CISG.

<sup>39</sup> Id at 519 (emphasis added).